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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.02.2005

CORAM

THE HONOURABLE MR.MARKANDEY KATJU, THE CHIEF JUSTICE
AND
THE HONOURABLE MR.JUSTICE D.MURUGESAN

R.C.P.No.54 of 2002

Commissioner of Central Excise
Chennai-II Commissionerate
M.H.U.Complex
No.692, Anna Salai
Nandanam
Chennai 600 035 .. Petitioner

-Vs-

1. Customs, Excise & Gold (Control)
   Appellate Tribunal
   South Zonal Bench at Chennai
   1st Floor, Shastri Bhavan Annexe
   26, Haddows Road
   Chennai 600 006

2. M/s Babcock Borsig Power Systems Ltd.,
   No.18/2A, Senneer Kuppam Bye-pass Road
   Poonamallee, Chennai 600 056 .. Respondents

Reference Application under sub-section (1) of Section 35H(1) of the Central Excise Act, 1944 against the final order No.180/2002 dated 25.2.2002 passed by the Customs, Excise & Gold (Control) Appellate Tribunal, South Zonal Bench at Chennai against Order in Appeal No.60/2000 (M-II) (A.No.35/99-M-II) dt. 28.4.2000 on the file of the Commissioner of Central Excise (Appeals) Chennai 34 against the Order in Original No.11/99 (C.No.V/15/57/98-(X-Adj) dt. 29.1.99 passed by the Addl. Commissioner of Central Excise (P & V) Chennai II, Commissionerate, Chennai 35.

For Petitioner :: Mr.K.Veeraraghavan
Senior Central Government
Standing Counsel

For Respondents :: R1-Tribunal
Mr.S.Muthuvenkataraman
for R2

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ORDER
(Order of the Court was delivered by
The Hon'ble The Chief Justice)

This is a reference application under Section 35H(1) of the Central Excise Act, by which the following question is sought to be referred to us for our opinion:-

> "Whether the Tribunal was right in passing the order on an issue not agitated before it and thereby reopening a matter already settled and not agitated before them?"

2. Heard the learned counsel for the parties.

3. We have carefully perused the judgment of the CEGAT dated 25.2.2002. In that judgment the CEGAT has recorded a finding of fact in paragraph 6 that there was no suppression of facts by the assessee to invoke the larger period of limitation under the proviso to Section 11A of the Central Excise Act. Mr.K.Veeraraghavan, learned counsel for the department submitted that the Assistant Commissioner as well as the Commissioner (Appeals) have recorded findings that there was suppression.

4. Under the hierarchy of quasi-judicial authorities, in the Central Excise Act, at the lowest is the Assistant Commissioner against whose orders appeals lie under Section 35 of the Central Excise Act to the Commissioner (Appeals) and, thereafter, a second appeal to the CEGAT under Section 35B. It may be noted that the second appeal to the CEGAT is not like a second appeal under Section 100 C.P.C., since it is not confined to questions of law. Second appeals under different statutes can have different meanings and different scope. A second appeal under Section 35B of the Central Excise Act is like a first appeal under Section 96 C.P.C. inasmuch as findings of fact can also be gone into and the CEGAT can re-appreciate or reassess the evidence. Thus the orders of the Assistant Commissioner and the Commissioner (Appeals) merge into the order of the CEGAT by the doctrine of merger, and the only order which now survives is the order of CEGAT. Hence the reference to the orders of the Assistant Commissioner and the Commissioner (Appeals) is wholly misconceived, as these orders no longer survive after the order of the CEGAT. The CEGAT has recorded a clear finding of fact that there is no suppression, and hence, obviously, the demand was time barred since the larger period of limitation under the proviso to Section 11A is not applicable.

5. Mr.K.Veeraraghavan, learned counsel for the department submitted that the Tribunal has granted the relief which was not prayed for and it has traversed beyond the scope of the dispute pending before it because the dispute was only regarding penalty and interest. In our opinion, this argument has no merits because once the Tribunal holds that the demand is barred by limitation in view of Section 11A of the Central Excise Act since there was no suppression, obviously the demand cannot be pressed

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against the assessee.

6. Thus there is no force in this reference application and it is rejected.

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Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

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   Appellate Tribunal
   South Zonal Bench at Chennai
   1st Floor, Shastri Bhavan Annexe
   26, Haddows Road
   Chennai 600 006

2. The Commissioner of Central Excise
   Chennai-II Commissionerate
   M.H.U.Complex
   No.692, Anna Salai
   Nandanam
   Chennai 600 035.

3. The Commissioner of Central Excise(Appeals),
Chennai 34.

4. The Addl. Commissioner of Central Excise,
(P & V), Chennai 35.

5. The Commissioner of Central Excise,
Chennai II, MHU Complex,
473, Anna Salai,
Nandanam, Chennai 35.

+ 1 CC to Mt.K.Veeraraghavan, Advocate SR NO 9026

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